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April 14.

THE MATTHEWS STEAMSHIP COM- } PLAINTIFF;  
PANY .....

AND

THE ONTARIO SAND AND GRAVEL } DEFENDANT.  
COMPANY .....

*Shipping—Collision—Negligence—Observance of Rules—Preliminary Act  
—Admissions therein.*

*Held, that the failure of the Master of a ship with plenty of sea room,  
to move out of instead of into danger is not merely an error of  
judgment but bad navigation. This is applicable where a ship is on*

the wrong side of the channel and is faced with the choice of endeavouring to put herself right by crossing the channel, or of using the sea room available in the opposite direction.

2. That the statements of fact in a Preliminary Act are statements which must be presumed to be made after the most careful examination and consideration, and where a pleading differs from the Preliminary Act the admissions made in the latter and their bearing upon the evidence adduced must be given very great weight in coming to a decision.

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ACTION brought by the plaintiffs against the defendant for damages by reason of collision between a ship owned by the plaintiff, and a barge, while under tow, owned by the defendants. The defendants counterclaimed for damages in respect of the said collision.

Toronto, the 17th, 18th and 19th days of March, A.D. 1926.

Case now tried before the Honourable Mr. Justice Hodgins, L.J.A.

The facts are fully set out in the reasons for judgment.

*Francis C. King, K.C.*, for plaintiff.

*J. H. Rodd, K.C.*, for defendant.

HODGINS L.J.A., now (April 14th, 1926), delivered judgment.

Action arising out of a collision between the *Yorkton* owned by the plaintiff, a steel vessel of 1,136 tons and 250 feet long, and the defendant's barge *Badger*, 140 feet long, 36 feet beam and drawing 1½ feet, while in tow of the tug *Tees*. The *Tees* is a vessel 86 feet long, 16 feet beam and drawing from 6 to 9 feet, and was towing the *Badger* by a towline 150 feet long. The accident happened near the entrance of the south channel in the St. Clair River just above Russell Island. The river is split into two channels, north and south, by Russell Island and the shoal to the northward of it. The south channel is about 750 feet wide.

The *Yorkton*, loaded and drawing 13 feet, was descending the river, while the *Tees* towing the *Badger* (light) was coming up the south channel. The *Yorkton* entering the south channel came on the *Badger* while the *Tees* was endeavouring to draw her towards the Canadian or east side of that channel. The tug had given a one-blast signal previously, indicating that the *Yorkton* should pass the tug and

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tow port to port. Just why the collision happened and how it came about are matters of some difficulty.

There are certain things in which the Masters of the *Yorkton* and the *Tees* agree, or which are shown by uncontradicted evidence. There is a gas buoy with a flashing light at the north end of the shoal, which extends north from Russell Island for about 3,000 feet, and this buoy had, before the accident, been moved a distance of 200 feet to the westward of its position as shown on the large chart, Ex. 1. Dredging had removed a large part of the shoal south and west of where the gas buoy was originally stationed, for a distance of 1,700 feet south of the buoy by its entire width from east to west.

The *Yorkton* was about 750 feet or about three lengths of that ship north of the gas buoy when, after a one-blast signal from the *Tees* she changed her course, and turned rapidly to starboard. The collision occurred to the west of the center line of the south channel and somewhat south of the gas buoy.

The *Tees*, after blowing her one blast signal, headed diagonally upstream for the North Walpole Light, which is off the Canadian or east shore of the channel, gradually straightening up towards port to avoid the Canadian bank. This movement enabled the master of the *Yorkton*, during her movement to starboard to see her green and red lights over the *Yorkton's* starboard bow. The *Yorkton* came far enough round to starboard to clear the tug, but struck the barge *Badger* a glancing blow about amidships with her port bow, at an angle stated by the opposing parties on the one hand to be about 45 degrees and 3 to 3½ points on the other. The tug hauled the *Badger* toward the shoal and grounded her there, where she sank.

So far this describes happenings which are not disputed, or are clear, but the difficulty occurs in determining just whether the account given by each ship accurately describes the way in which they came upon one another, and their previous courses, and the true reason for the collision.

I now come to what is controversial, and I may say that there is an absolute contradiction on almost every essential question which is in issue. Guesswork also enters into many of the answers made during the trial.

The course of the *Yorkton* down stream is given by her master, second mate, and wheelsman, as being steadied on the flashing white light gas buoy at the head of the shoal north of Russell Island, when a mile above it, and passing the Snye River (The Chenal Ecarté) marked X on chart. Then when about half a mile (or a little less) above the gas buoy she swung slightly to port (about 1 to 1½ points) at a position marked ⊕ on the chart, and steadied on a course midway between the lower red light on Walpole Island (Canadian side) and the gas buoy. The *Yorkton's* progress had been checked, opposite the Snye River to one-half speed, i.e., 6 miles to which is added two miles of current—8 miles over the ground, and this speed was maintained until the *Tees* had blown one blast, when after blowing a danger signal, the wheel was put hard to port, the engineer put full speed ahead to get the current on the rudder to start a swing. As she started to swing, the engines were put full speed astern and the wheel put amidships. The version of the Master of the *Tees* and others is that the *Yorkton* was heading for the north channel on a cluster of lights on a dredge then moored at Dana dock on the American shore. Dana dock is shown on the chart as bearing almost northwest of the gas buoy, and about 1,600 feet west of it. The *Yorkton* is then said to have suddenly changed her course to port when three ship lengths above the buoy, and two lengths to the west of it, and to have headed across the river above the buoy, pointing across the entrance to the south channel. This puts the *Yorkton* the same distance to the north of the buoy as her Master says she was when she heard the *Tees* one-blast signal. It is impossible to reconcile these two stories. In examining them I think the assertion on behalf of the *Tees* that the *Yorkton* was 500 feet or two ship lengths to the west of the gas buoy and that she then turned sharply to port heading across for the east side of the channel is not one that can be accepted. It is not consistent with the defendants pleading, though it is with their preliminary act which however says that the turn to port continued sharply. It is based on a theory which seems to be rather far fetched, and probably proceeds from some knowledge gained before the trial that the Master of the *Yorkton* thought when he saw the cluster of lights which proved to be the tug and

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tow, that they were those of the dredge which on his up trip he had seen working on the shoal. To lend probability to it, evidence was given that when the *Yorkton* was first sighted her so-called range lights were open and that she therefore seemed to be steering into the north channel and had to make a sharp turn to port when she discovered her mistake in direction. Added to this was the fact that the dredge had moved over to Dana dock as I have mentioned, and was lit up. If the *Yorkton* had got 750 feet north of the gas buoy and two ships lengths (500 feet) to the west of it, she would then have got almost ahead of the Dana dock before making the turn, and certainly was not pointing for it. It is rather incredible that a large ship with a full cargo, when intending to make for the south channel, should have steered on a cluster of lights more than one-quarter of a mile west of the flashing light of the gas buoy which was in full view.

It is also quite inconsistent with the idea that if she was on the course described by the Master of the *Tees* she could have got herself within 500 feet west of the gas buoy when she made a turn to port.

The Master of the *Yorkton* is somewhat confused as to the exact position, in relation to the gas buoy light, of the cluster of lights which he saw. If he came down on the course he states the position of the lights on the tug and barge in relation to the gas buoy as seen from the *Yorkton* would depend largely on just where the tug and tow were, for it must be borne in mind that the gas buoy had been moved approximately 200 feet west of its former position. If the *Yorkton's* course was midway between it in its new position and the lower Walpole light, it would be further west of the centre line of the south channel than is shown on the chart, and the lights of an upcoming craft might appear to him to be on the left or right of this gas buoy, depending on whether that craft was either well up or lower down the channel. He finally fixed on the cluster of lights being to the left of the gas buoy from his point of view, and practically in line with the lower red lights on Russell Island, and this coincides with the evidence on behalf of the *Tees* as to her own distance below the gas buoy about that time. It is of course quite evident that the Master of the *Yorkton* did steer in the direction of

some cluster of lights, but he puts them as showing over the flashing gas buoy light, and extending behind it, and whether properly described as a cluster of bright white lights, or not, they were evidently those carried by the tug and tow.

The course of the *Tees* and her barge is given as being about abreast of the head of Russell Island and in or near the middle of the south channel, when the *Yorkton* was  $1\frac{1}{2}$  miles away. The tug was over 2,500 feet or nearly half a mile below the gas buoy then. As to when she saw the *Yorkton* change her course, her Master says

When I got within about half a mile as near as I could judge, the *Yorkton* swung sharply to port \* \* \* within about half a mile of the *Yorkton*, that is, in a direct line, she swung sharply to port.

On cross-examination he says,

I would figure that we were about a mile apart when she altered her course to port, or about half a mile, pardon me \* \* \* we would be about 1,300 feet—1,200 feet, I couldn't just say exactly—

I have come to the conclusion that these last figures are incorrect and that his distance from the *Yorkton* was further than the quotation indicates. The *Tees* is not admitted to have changed her position in relation to midchannel till she saw the *Yorkton* change her course. It is quite probable, however, that as the position of the gas buoy had shifted 200 feet west, the *Tees* would be rather over in the west half of the channel and not in mid channel. It is stated by her Master that the down current sets towards the Canadian shore, so that getting close to the Russell Island side would be a natural thing to do, though he denies doing so. Crossen, the second mate of the *Yorkton*, and others, say that the *Tees* was on the Russell or west half of the channel, and McLeod, the Master of the *Badger*, gives her position just before the collision as in the west half of the channel. Duff, Master of the *Superior*, called for the defendants, says that when he saw the tug and tow they were pretty close to Russell Island, as though they intended to cross between the buoy and the island. Though this witness very clearly showed his unreliability, the defendants cannot complain if his early statement to Mr. Theodore Robinson, Ex. 3, is used against them, especially as he adduces a reason for his belief which discloses an interest in their position in relation to his ship. The

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evidence of the Master of the *Tees* that the tug got within 200 feet of the Canadian shore while towing the barge across is important. The barge with her tow line must have extended 290 feet (140 plus 150 feet) behind the *Tees*, and adding 86 feet, the length of the tug, would leave only about 175 feet of channel behind the barge or say one-quarter of the entire width of the channel. From this position in the channel the barge must have started. This conclusion is strengthened by the evidence as to where the collision took place. The evidence on the part of the *Yorkton* is that the tug and tow, when first seen in relation to the gas buoy, as well as when the collision took place, were comparatively near it. They are not agreed as to exact distance, but put it within such a distance as to show that the *Tees* and tow were in the western half of the channel. Those called for the *Tees* and *Badger* on the same point, are almost all equally positive that the tug and tow were in the middle of the channel when they began to go to starboard across it, and that the collision took place near the Canadian shore.

The probabilities, if not the certainties, are wholly in favour of the tug and tow being to the west of midchannel at both periods of time.

There is one witness, McLeod, Master of the *Badger*, who may be supposed to know where she was before and after the collision, and he puts the *Badger* in the west half of the channel, and as only going her own length, 140 feet, before she was struck. The tendency of the tow at the end of so long a line would be to swing. The position of the *Badger*, when sunk, seems to me upon the whole evidence, reasonably certain—she was off the shoal and not far from the buoy and when struck went under the stern of the *Yorkton* which was then certainly not in the east half of the channel. I am forced to the conclusion that the tug and tow were in the west half of the channel when they commenced to move across it. This would be her wrong side and she must bear whatever consequences flow from this finding. Rule 25 governs. Speaking of it, Marsden, 8th Edn., p. 415, says:—

Any person in charge of a ship who navigates her on the wrong side of a narrow channel, besides being guilty of a misdemeanour, will in

most cases subject himself and his owners to liability for any collision occurring when he is on his wrong side.

This rule in Canada has been dealt with in *C.P.R. v. SS. Camosun* (1) (which I have considered on other points in connection with this action). *SS. Coniston v. Frank Walrod* (2), and *Tucker v. SS. Tecumseth* (3), which last case refers to the rule which the President of this court has repeatedly emphasized, that the risk of collision, and not only the imminent collision itself, must be considered and dealt with.

I have come to the conclusion that what the master of the *Yorkton* saw beyond the gas buoy light were the lights of this tug and tow; that the *Yorkton* was on the course described by her Master, and that the *Tees* and her tow were somewhat more than half a mile from the *Yorkton* when the signal was given by the *Tees*. And if I had been able to accept the account of the *Yorkton's* course sworn to by the *Tees*, it would put that vessel in the position of having given a signal requiring an immediate right angled circling turn to avoid the tug, a very difficult manoeuvre to be demanded in the situation then existing.

In the position, as described by the *Tees*, the *Yorkton* would have been a crossing ship and bound to keep out of the way of the *Tees* without any signal required, except possibly an alarm. See *The Seacombe* (4).

In the view I have taken of the relative positions of the vessels when the one blast was blown by the Master of the *Tees*, the question arises whether this was a proper thing for him to have done under the circumstances.

The down-coming loaded ship had the right of way and the current was with her, setting in towards the Canadian shore. Her master had seen the lights on the tug and tow to his left, and to the left of the gas buoy, and though he was under the impression that they represented a dredge at work, he would feel safe in keeping his course until he was near the gas buoy where he would be bound to turn into the South channel. When he came near enough to see what the lights indicated it would have been a natural thing to turn somewhat to port to avoid them, and this

(1) [1925] Ex. C.R. 39.

(2) [1918] 19 Ex. C.R. 238.

(3) [1905] 10 Ex. C.R. 44.

(4) [1911] 81 L.J. Adm. 36, 37,  
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would bring him into the eastern half of the channel. Such a course was adopted and approved in *U.S. Steel Products v. Sincennes McNaughton Lines* (1), when the *Steel Motor* was about 250 feet distant from the upward-bound tug and tow. The Master of the *Yorkton* says that he had his hand on the rope to blow two blasts indicating such a course which according to the witness Solery would have been the proper action to take then. But he was anticipated by the *Tees* which blew one blast, and then started at full speed diagonally across the channel so as to get out of the way of the *Yorkton*, and afterwards accelerated when the alarm signal was heard. The Master of the *Tees* says that two minutes elapsed after he started across before he heard the alarm. This would show that the *Tees* had moved, even at her previous speed of five miles an hour, some 350 feet in a minute. This one blast and the consequent action of the *Tees* led to a very difficult situation, whether the *Yorkton* was more than half a mile away or something less. The questions naturally suggested are whether the Master of the *Yorkton* should have persisted in his intention, and so signalled, instead of attempting what proved to be the impossible, or whether the action of the *Tees* in giving the signal to pass to port gave him no reasonable option in the situation then developed. This was that the *Tees* immediately attempted to haul a heavy barge against the current and across the path of the descending vessel. There was good water on the port side of the *Tees* owing to the shoal having been dredged away for 1,700 feet south of the gas buoy, a fact which the Master of the *Tees* admits he knew. As pointed out by the late Mr. Justice McLennan in *Export SS. Ltd. v. SS. Icoma* (2).

It is not necessary for meeting ships to change their course from the centre of their respective sides at a very great distance from each other and that in fact, they can approach each other with safety to a comparatively short distance and that then with proper manoeuvring they pass without difficulty.

Naturally their relative positions, speed, current, and character of the vessels are all ingredients in the solution of what can be called "proper manoeuvring," but notwithstanding these factors I see nothing impossible in the situ-

(1) [1925] Ex. C.R. 154.

(2) [1923] Ex. C.R. 119.

ation had the Master of the *Tees* dealt with it differently.

On the best consideration I can give this difficult case I have come to the conclusion that whether the *Yorkton's* course as asserted by her, or that put forward by the *Tees*, is adopted, the result must be the same.

If the *Yorkton's* course was what I find it to be then that steamer had the right of way, and if it had recognized the lights as those of an upbound vessel was bound to signal its course before coming within half a mile of her. The evidence of the *Tees* shows that this right—a most important one—was anticipated by the *Tees*, and that the signal given by her greatly complicated the situation. She was on the wrong side of the channel, and her signal was no doubt prompted by a desire to get into her proper position to pass as provided in Rule 31. Her burden was increased thereby as I held in *Canadian Sand and Gravel Co. v. SS. Keywest* (1). I cannot credit what is stated by some of the witnesses for the defendants that the *Yorkton* answered accepting the *Tees'* first signal with one blast. It is denied by all the witnesses for the *Yorkton*. It would be a rather inconsequent proceeding for the *Yorkton* to go in the face of Rule 22, and to accept the signal and then immediately to sound an alarm. That she did sound the alarm signal is not denied, and I find she did so on getting the passing signal from the *Tees*. There being plenty of water on the port side of the tug to enable her to go to port if she had left the *Yorkton* free to go to starboard, the collision would have been avoided. The situation was forced by a vessel on the wrong side of the channel and became a dangerous one when coupled with the movement to starboard instead of to port. The position in respect to the freedom to move out instead of into danger, having plenty of searoom, is like that in the case of the *Glencova v. Soward* (2), and may be contrasted with that involved in the *SS. Fryer v. SS. Westmount* (3).

The failure of the *Tees* to do this, instead of attempting to cross over, was I think not merely an error of judgment but bad navigation.

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(1) [1917] 16 Ex. C.R. 294.

(2) [1925] Ex. C.R. 217.

(3) [1924] Ex. C.R. 109.

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If her own evidence was taken at its full value the situation would be much worse, for it exhibits the *Yorkton* actually crossing the channel to the east side, met with a signal requiring her to turn abruptly to starboard, thus making her converge on the course of the *Tees*, and her tow, which with the length of the towline would stretch out 350 feet in a channel not much over twice that width.

The evidence satisfies me that the *Yorkton* did all that could be done, and all that proper seamanship and navigation demanded in the circumstances, and this is affirmed by Williams and Solery, who were called as expert witnesses. Any other course seems to be forbidden by Rule 22, which provides what shall be done in case of a signal given erroneously. This was, in substance done, having regard to the provisions of Rules 25 and 27. There was no lookout on the tug. How far this contributed to the accident I have no means of saying. Had there been one he would most probably have agreed with the other tug witnesses whose evidence I have rejected—*de nihilo nihil fit*.

There was a strong effort made at the trial to show that the lights on the tug and tow were in fact a cluster of bright white lights, in fact that the working lights of the *Badger*, three clusters of six lamps each, were lit up while the vessel was being towed up the river, thus misleading the *Yorkton* and preventing her from seeing the navigation lights of the *Tees*. The *Tees* did carry more lights than is allowed by Rules 1 and 2 (c). I regard these rules as meaning that such a vessel as the *Tees*, 86 feet long, should not carry the additional light mentioned in 2 (c). In the barge there were also lights in excess of those required and permitted by Rule 5. The lights carried were given by McLeod, the captain of the *Badger*, as being the red and green lights and four deck lights—two on the port, and two on the starboard side, one on each cabin, of which those on each side of the aft cabin were not screened. Adding the lights of the *Tees* and the *Badger* together they appear to make up (so far as white lights are concerned) from five to ten, excluding the cluster lights 18 bulbs in all. Whatever the real number was, they were enough to attract attention and may have obscured the navigation

lights as asserted by those on the *Yorkton*. They were seen through binoculars one and one-half miles away where Crossen, the second mate of the *Yorkton*, says he saw three bright lights. Their importance is said to be that they were mistaken for lights indicating a stationary vessel such as a dredge at work, when they were in fact moving, though moving not laterally, but almost dead ahead so far as the *Yorkton* was concerned. I understood McLeod, captain of the *Badger*, to say that he turned on the cluster lights when the anchor of the barge went down after the collision. The fact that they were burning earlier is a matter of doubt upon the evidence owing to the absolutely conflicting accounts given by each side. But what Crossen (second mate of the *Yorkton*) said indicates that three bright lights were seen, and considered when 1½ miles away. These should have created in his mind and that of the Master some lively interest, and I cannot understand why they were not examined from time to time through the glasses in order to make sure what they really indicated. If the cluster lights were, as is alleged, all lit up, they would have disclosed some portion of the barge in time for the *Yorkton* to have determined what she should do. But not having taken the precaution to examine them more closely on the way down as I have mentioned, I should have difficulty in exonerating the *Yorkton* from contributing to the complication had she kept on her course under the impression that they were on a stationary craft, and then edged in too close in passing the buoy. But the signal from the *Tees* and its immediate start eastward precipitated matters and found the *Yorkton* confronted with a vessel crossing her course and hauling a large barge with a long towline. I do not, therefore, attach as much importance to the lights carried by the *Tees* and *Badger* as counsel did. I think their influence was spent when the *Tees* blew her whistle and started eastward. The *Yorkton* on getting near the buoy on her course into the south channel had time to sheer off on identifying the meaning of the lights. The vessels when the *Tees* signalled were at least one-third of a mile apart.

There is one matter which lies apart from the indications inherent in the situation as far as they can be extracted, that to my mind is of importance where the stories told by

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each side are in some important respects absolutely irreconcilable. In the defendants' preliminary act it is stated that the *Tees* had range lights, towing lights and sidelights brightly burning, and the same expression is used as to those on the *Badger*. It is also stated that the *Tees* and *Badger* were in midchannel, or slightly to the east of it, and that

When the *Yorkton* changed its course to port the tug gave one blast, passing signal which was similarly answered by the *Yorkton*, and as the *Yorkton* continued sharply to port the tug and tow proceeded as fast as possible to starboard and went full speed ahead in the hope of passing safely. There was also an answering alarm signal given by the tug.

This omits any change to starboard on the part of the *Yorkton* before the tug hauled to the eastward, and confirms the *Yorkton's* witnesses that she changed course to port above the buoy.

In the statement of defence the tug and tow are placed on the Canadian or east side of the South channel, and in paragraph 6 appears the following:

A short distance below the gas buoy known as Russell Island Shoal Light the *Yorkton* coming at full speed of about ten miles an hour, twice that of the speed of the tug and tow, turned sharply to starboard, whereupon the tug *Thomas E. Tees* blew a one-blast passing signal and was similarly answered by the *Yorkton*. The sharpness of the turn made by the *Yorkton* brought it into the channel at a very sharp angle, and apparently being unable to straighten down the channel quickly enough gave a danger signal answered by the *Thomas E. Tees*.

It was urged during the trial that the statement of defence should be amended to conform to the preliminary act, but I refused the application as the evidence was practically all in and the plaintiff had the right to comment on the discrepancy, and no evidence had been disallowed on account of the difference in the two statements. The importance of it is that what is said in the defence exactly corresponds with the story told by the *Yorkton* witnesses in this particular that after the change of course from the gas buoy to a course between it and the lower Walpole light there was no change except to starboard in response to the signal of the *Tees*, and in that the statement of defence asserts that the change of the *Yorkton's* course was made south of the gas buoy and not to the north of it. The importance of the statements in the preliminary act and when the privilege of changing them arises, are well set out in *Seacombe* (ante). In it Fletcher Moulton (then

L.J.) says in respect to what is contained in the preliminary Act, p. 60:—

They are statements of fact made under such circumstances that they rank as formal admissions of fact, binding the party making them, perhaps as strongly as any admissions of fact can do. An admission of fact, as such, does not constitute an estoppel. It may be shown that it was made under mistake, and the Court may be satisfied that such was the case. But it is evidence against the party making it, its strength varying according to the conditions under which it is made. An admission under circumstances which necessitate that it must have been made after full consideration has an evidential value far higher than a casual admission made without any opportunity of reflection or verification. The statement of fact in a preliminary act are statements which must be presumed to be made after the most careful examination and consideration. To my mind they carry such weight, from the nature of a preliminary act and from the circumstances under which it is made, that I should doubt whether otherwise than under the most special circumstances, and with the special leave of the Court, a party would be allowed to depart from the admission in its preliminary act; at all events as far as evidence in chief is concerned.

As the statement of defence differs from the preliminary act, it shows the necessity in this case for the due weighing of the admissions therein made, and their bearing upon the evidence adduced when coming to a decision. It is with this in mind that I have found the facts and from them flow the consequences I have indicated.

I cannot part from this case without emphasizing the complete divergence in the accounts of the events of the night leading up to the accident not only as to the positions of the respective vessels, but as to the signals exchanged, the courses set, and the changes in them, as well as to the lights upon the tug and tow. This throws a heavy burden upon a trial judge, necessitating a close examination of the probabilities of the case and of the veracity of the various witnesses. It has proved a rather tangled problem, necessitating considerable thought and study before arriving at a conclusion.

The result is that I cannot find the *Yorkton* to blame, and attribute the collision in this case to the course taken by the *Tees* which I find to have been wrong and negligent. While I have not discussed several points put forward on each side, I have considered them all as presented by the very full and exhaustive arguments submitted after the trial by counsel on each side.

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Judgment will be entered for the plaintiff and the counterclaim will be dismissed, and there will be a reference to the Registrar of this Court to assess the damages to the *Yorkton*.

The defendants must pay the costs of action, counterclaim and reference.

*Judgment accordingly.*

Solicitors for plaintiff: *King & Smythe.*

Solicitors for defendant: *Rodd, Wigle & Whiteside.*